

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

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IN RE: AQUEOUS FILM-FORMING *
FOAMS PRODUCTS LIABILITY * MDL No. 2:18-mn-2873
LITIGATION *
* June 21, 2019
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REPORTER'S OFFICIAL TRANSCRIPT OF THE STATUS CONFERENCE
HELD BEFORE THE HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE
JUNE 21, 2019

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Proceedings recorded by mechanical stenography using computer-aided transcription software.

9 : 1 3 A M 1 (Call to order of the Court.)

9 : 1 3 A M 2 THE COURT: Good morning. Please be seated. Okay.

9 : 1 3 A M 3 We are here with our monthly status conference in our AFFF MDL.

9 : 1 3 A M 4 Let me have counsel first for the plaintiff who

9 : 1 3 A M 5 will be speaking here today identify themselves for the record,

9 : 1 4 A M 6 please.

9 : 1 4 A M 7 MR. THOMPSON: Your Honor, my name is Fred Thompson.

9 : 1 4 A M 8 I'm the plaintiffs' liaison counsel.

9 : 1 4 A M 9 THE COURT: Yes, sir.

9 : 1 4 A M 10 MR. LONDON: Good morning, Your Honor. Michael

9 : 1 4 A M 11 London on behalf of the PEC.

9 : 1 4 A M 12 MR. SUMMY: Good morning, Your Honor. Scott Summy.

9 : 1 4 A M 13 MR. NAPOLI: Good morning, Your Honor. Paul Napoli.

9 : 1 4 A M 14 MR. BILOTT: Good morning, Your Honor. Rob Bilott,

9 : 1 4 A M 15 advisory counsel.

9 : 1 4 A M 16 THE COURT: Thank you. Okay. Mr. Petrosinelli, good

9 : 1 4 A M 17 morning.

9 : 1 4 A M 18 MR. PETROGINELLI: Good morning. Joe Petrosinelli,

9 : 1 4 A M 19 one of the defense co-leads.

9 : 1 4 A M 20 MR. DUKES: Good morning, Your Honor. David Dukes.

9 : 1 4 A M 21 MR. OLSEN: Good morning, Your Honor. Michael Olsen.

9 : 1 4 A M 22 MR. DUFFY: Good morning, Your Honor. Brian Duffy as

9 : 1 4 A M 23 co-lead.

9 : 1 4 A M 24 MR. RING: Good morning, Your Honor. Dan Ring.

9 : 1 4 A M 25 MS. WILLIAMS: Good morning, Your Honor. Sarah

9 : 1 4 AM 1 williams for the United States.

9 : 1 4 AM 2 THE COURT: Okay. Folks, I have a list, and then
9 : 1 4 AM 3 we'll go through my list, and if there are other matters that
9 : 1 4 AM 4 counsel wish to raise with me, I'm delighted to hear from you
9 : 1 4 AM 5 about that.

9 : 1 4 AM 6 Someone give me a status report on our efforts
9 : 1 5 AM 7 to develop plaintiff and defense fact sheets.

9 : 1 5 AM 8 MR. RING: Mr. London and I will address that one.
9 : 1 5 AM 9 Dan Ring on behalf of the Defense Coordinating Committee.

9 : 1 5 AM 10 I'm pleased to report that after what could only
9 : 1 5 AM 11 be described as extensive give and take and back and forth with
9 : 1 5 AM 12 Mr. London and others that on four plaintiff fact sheets -- and
9 : 1 5 AM 13 I'll explain what they are in a moment -- we've reached a
9 : 1 5 AM 14 general consensus, with one caveat I will explain. And the
9 : 1 5 AM 15 four, Your Honor, are an individual personal injury fact sheet,
9 : 1 5 AM 16 an individual property damage fact sheet, an individual medical
9 : 1 5 AM 17 monitoring fact sheet, and a water provider fact sheet.

9 : 1 5 AM 18 If a person has more than one of those
9 : 1 5 AM 19 individual claims, they'll fill out more than one fact sheet.

9 : 1 5 AM 20 THE COURT: Sure.

9 : 1 5 AM 21 MR. RING: And the one exception there is a question
9 : 1 5 AM 22 that overlaps with the defense fact sheet that the defense has
9 : 1 5 AM 23 proposed to take out, and if it's reciprocal, we'll take it out
9 : 1 6 AM 24 in both.

9 : 1 6 AM 25 The defense fact sheet, we have exchanged

9 : 1 6 A M 1 drafts. we're not yet at the point of being able to say we
9 : 1 6 A M 2 have a consensus or disagreements to present to the Court. The
9 : 1 6 A M 3 CMO that goes along with those as a proposed implementing
9 : 1 6 A M 4 order, we actually have made a great deal of progress, and
9 : 1 6 A M 5 conceptually I think we're in agreement. There are a couple of
9 : 1 6 A M 6 issues, one of which is also on the agenda today, is -- relates
9 : 1 6 A M 7 to the responsive pleadings and whether that's a trigger
9 : 1 6 A M 8 date --

9 : 1 6 A M 9 **THE COURT:** Correct.

9 : 1 6 A M 10 **MR. RING:** -- for fact sheets. And in part,
9 : 1 6 A M 11 Mr. Petrosinelli will address responsive pleadings, but I'll
9 : 1 6 A M 12 just touch on them now.

9 : 1 6 A M 13 The plaintiffs have proposed that the trigger
9 : 1 6 A M 14 date be off a responsive pleading. The defense has proposed
9 : 1 6 A M 15 the trigger date just simply be a set date number of days after
9 : 1 6 A M 16 the order is entered implementing the fact sheets, and that
9 : 1 7 A M 17 dispute is in front of the Court today. Once that is resolved,
9 : 1 7 A M 18 that will resolve certain provisions of the CMO itself and the
9 : 1 7 A M 19 timing for when fact sheets would need to be answered.

9 : 1 7 A M 20 **THE COURT:** You know, I'm telling you something as an
9 : 1 7 A M 21 experienced MDL lawyer you know. The fact sheets are both of
9 : 1 7 A M 22 y'all's best friends, right? We're kind of narrowing and
9 : 1 7 A M 23 focusing, and it makes everybody really drill down in a way
9 : 1 7 A M 24 that narrows the case but focuses it, and it is in everybody's
9 : 1 7 A M 25 interests. So I understand how there could be disagreements,

9 : 1 7 AM 1 and y'all have different needs and different approaches, and
9 : 1 7 AM 2 I -- there are understandable differences. If you reach an
9 : 1 7 AM 3 impasse on any of this stuff, I'm glad to decide it, okay? I
9 : 1 7 AM 4 think it's better for y'all to do it, but I'm prepared to do
9 : 1 7 AM 5 it. It's not that hard for me.

9 : 1 7 AM 6 Let me because you've raised the -- I was going
9 : 1 7 AM 7 to do it a little bit later today, this whole responsive
9 : 1 7 AM 8 pleading thing, and let me just raise a concern I have. I
9 : 1 8 AM 9 know, you know, people say, "Oh, you know, you file the
9 : 1 8 AM 10 complaint. Then you get a -- you know how lawsuits are. You
9 : 1 8 AM 11 get the answer." MDLs are a little funny about all of that,
9 : 1 8 AM 12 because we're talking about lots of pleadings. The most
9 : 1 8 AM 13 important part of a -- of both the complaint and the answer is
9 : 1 8 AM 14 to put everybody on notice what issues are in contest. And I'm
9 : 1 8 AM 15 less concerned about, you know, pushing a date for the -- for
9 : 1 8 AM 16 the answers as I am about having the defendants in some
9 : 1 8 AM 17 meaningful way to assert what those major defenses are. And
9 : 1 8 AM 18 why do I want that? Because we're going to do discovery, and
9 : 1 8 AM 19 everybody has got to know -- I mean, I think Mr. London can
9 : 1 8 AM 20 probably guess what those defenses are, but they need to be
9 : 1 8 AM 21 stated, and that to me is like a really important thing. I
9 : 1 8 AM 22 think Ms. Williams actually made that proposal. The whole idea
9 : 1 8 AM 23 of getting the answers in -- I mean, I remember in my prior
9 : 1 9 AM 24 MDL, we had all this stuff about how we were going to do it.
9 : 1 9 AM 25 It was going to be a single common answer. Are we going to

9 : 1 9 AM 1 have individual ones? And it just seemed to me a lot of
9 : 1 9 AM 2 trouble and a lot of burden on everybody that wasn't that
9 : 1 9 AM 3 important, but what is important is what are those defenses?
9 : 1 9 AM 4 So I want y'all to talk about that. I'm not all burned up
9 : 1 9 AM 5 about when that answer comes in right this moment. That to me
9 : 1 9 AM 6 is less important than the defendants candidly disclosing what
9 : 1 9 AM 7 they see now as their defenses.

9 : 1 9 AM 8 Now, listen, folks. We could get in the middle
9 : 1 9 AM 9 of discovery, and there may be new claims and/or new defenses
9 : 1 9 AM 10 arising out of discovery. That happens in litigation, but I
9 : 1 9 AM 11 think that is the bigger concern I have. So I want y'all --
9 : 1 9 AM 12 next month we'll talk about that, but I want y'all to think
9 : 1 9 AM 13 about a way in which the assumptions of the plaintiffs are
9 : 1 9 AM 14 confirmed about what the issues are. That's really what I want
9 : 2 0 AM 15 laid out.

9 : 2 0 AM 16 And, you know, if people feel strongly about
9 : 2 0 AM 17 having answers filed, we can talk about an efficient way to do
9 : 2 0 AM 18 it. I just sort of think it's just at this point there are
9 : 2 0 AM 19 bigger fish to fry than the technicalities of getting all these
9 : 2 0 AM 20 answers in.

9 : 2 0 AM 21 So unless y'all want to address that issue in
9 : 2 0 AM 22 more detail now, I'm going to suggest -- Mr. Petrosinelli, what
9 : 2 0 AM 23 are your thoughts about that?

9 : 2 0 AM 24 **MR. PETROGINELLI:** I think you've given us the
9 : 2 0 AM 25 guidance we need, and we ought to talk about it.

9 : 2 0 A M 1 THE COURT: But I don't want to hold up the fact
9 : 2 0 A M 2 sheets. I want the fact sheets moving. I -- you know, one of
9 : 2 0 A M 3 the things here is -- and, you know, this is MDL by Judge
9 : 2 0 A M 4 Fallon, and he says get those fact sheets in, because it --
9 : 2 0 A M 5 it's everybody's friend. It helps the case get structured, and
9 : 2 0 A M 6 I don't want to be delaying that for the answer, because to me
9 : 2 0 A M 7 the fact sheet is a lot more important.

9 : 2 0 A M 8 I mean, I can think in my 30 years of practice
9 : 2 1 A M 9 maybe three times the answer actually mattered, okay? Usually
9 : 2 1 A M 10 when the defendant puts something in it he or it lived to
9 : 2 1 A M 11 regret, okay? Other than that, I never remember it mattering,
9 : 2 1 A M 12 okay? But -- so I'm not -- so y'all talk about it, and we'll
9 : 2 1 A M 13 deal with it next month, and if I need to rule on it, I'll make
9 : 2 1 A M 14 a determination of that.

9 : 2 1 A M 15 But -- so I want y'all to get to the defense
9 : 2 1 A M 16 fact sheets. I'm not surprised that y'all have made progress
9 : 2 1 A M 17 on the plaintiffs, but this needs to be reciprocal, and, you
9 : 2 1 A M 18 know, we need to be -- one of our tasks here is to try to
9 : 2 1 A M 19 trace, you know, where are the sites at issue, and tracing the
9 : 2 1 A M 20 product that went to those sites is going to be an important
9 : 2 1 A M 21 part of the building blocks of this case, and I want us to get
9 : 2 1 A M 22 on with that.

9 : 2 1 A M 23 At some point, you know, we're going to be going
9 : 2 1 A M 24 to the federal government saying, "This is where -- we've come
9 : 2 1 A M 25 to your door," but you got to do that. You got to give them --

9 : 2 2 A M 1 that information, you know, I think is an important part of
9 : 2 2 A M 2 that. So --

9 : 2 2 A M 3 **MR. RING:** And to your point, Your Honor, to get to
9 : 2 2 A M 4 the fact sheets, rather than even waiting to the next
9 : 2 2 A M 5 conference, what Mr. London and I have discussed is using the
9 : 2 2 A M 6 next week to two weeks to see if we can iron out differences on
9 : 2 2 A M 7 the defense fact sheet which was trailing our work on the
9 : 2 2 A M 8 plaintiff fact sheets and the CMO, and by July 9th, sooner if
9 : 2 2 A M 9 we can, submit either we agree or we don't, and just --

9 : 2 2 A M 10 **THE COURT:** I'll rule. I mean, you know, I don't
9 : 2 2 A M 11 mind ruling on these things, but I do think it'll be the best
9 : 2 2 A M 12 thing that happened to everybody to getting these fact
9 : 2 2 A M 13 sheets -- the process beginning, and as new parties come in, to
9 : 2 2 A M 14 get them filled -- it's an important part and building block
9 : 2 2 A M 15 for the case.

9 : 2 2 A M 16 **MR. RING:** And one of the intersecting issues is we
9 : 2 2 A M 17 did get the proposed master discovery, so we're looking at
9 : 2 2 A M 18 that --

9 : 2 2 A M 19 **THE COURT:** Right.

9 : 2 2 A M 20 **MR. RING:** -- in conjunction with the defense fact
9 : 2 2 A M 21 sheet.

9 : 2 2 A M 22 **THE COURT:** Right, and, you know, in some ways -- you
9 : 2 2 A M 23 know, in some things we don't really need to address that,
9 : 2 3 A M 24 because we're going to address it in the form of discovery
9 : 2 3 A M 25 responses. All I'm trying to do is in a sort of organized,

9 : 2 3 AM 1 systematic way, let's get the document discovery moving, and
9 : 2 3 AM 2 let's -- to the extent we have people who don't really have
9 : 2 3 AM 3 claims, let's know that, and the people who do have claims, we
9 : 2 3 AM 4 want to be able to, you know, to litigate their claims, okay?

9 : 2 3 AM 5 **MR. RING:** Thank you, Your Honor.

9 : 2 3 AM 6 **THE COURT:** Thank you very much. Last month we
9 : 2 3 AM 7 talked about a potential deposition protocol. I know the
9 : 2 3 AM 8 plaintiff said, "Hey, the rules are fine." Defense said,
9 : 2 3 AM 9 "Well, we had some small concerns." Did y'all make any
9 : 2 3 AM 10 progress on that?

9 : 2 3 AM 11 **MR. THOMPSON:** Your Honor, in the joint status report
9 : 2 3 AM 12 though, we've exchanged deposition protocol, and I believe that
9 : 2 3 AM 13 we're making good progress. We will have one.

9 : 2 3 AM 14 **THE COURT:** Let's get it done, or if not -- I mean,
9 : 2 4 AM 15 let's not reinvent the wheel. I mean, rules are generally sort
9 : 2 4 AM 16 of okay. Y'all among yourselves ought to be able to work it
9 : 2 4 AM 17 out, but if there's some basic things that for orderliness, I'm
9 : 2 4 AM 18 all for doing it, but let's not reinvent the wheel on this
9 : 2 4 AM 19 thing, okay?

9 : 2 4 AM 20 Let's -- I had a motion to dismiss filed
9 : 2 4 AM 21 recently by the County of Suffolk. It raises a number of
9 : 2 4 AM 22 issues that would cover all the cases, and I was a little
9 : 2 4 AM 23 surprised to be getting a motion to dismiss at this stage. I'm
9 : 2 4 AM 24 certainly not going to issue orders on 106 different cases on
9 : 2 4 AM 25 motions to dismiss picking apart pleadings. That's just not

9 : 2 4 AM 1 the way we do things in MDLs. The case is not going away on a
9 : 2 4 AM 2 motion to dismiss, at least the one filed by the County of
9 : 2 4 AM 3 Suffolk, and it highlights -- I was a little surprised, because
9 : 2 4 AM 4 it wasn't signed by the -- by the Defense Coordinating
9 : 2 4 AM 5 Committee, and I went back, and I realized the CMO didn't
9 : 2 5 AM 6 require it, just consultation. And we're going to have chaos
9 : 2 5 AM 7 if we have random parties filing motions to dismiss. There's
9 : 2 5 AM 8 no way we're going to keep -- I mean, I'm not going to issue
9 : 2 5 AM 9 106 different orders on motions to dismiss.

9 : 2 5 AM 10 And I'm thinking about changing the CMO 2 to
9 : 2 5 AM 11 require the -- A, the -- if a motion to dismiss is filed, that
9 : 2 5 AM 12 it be signed by the Defense Coordinating Committee; and
9 : 2 5 AM 13 secondly, if it's applicable to other claims, to file them all
9 : 2 5 AM 14 at once. Don't file me random ones, because there were many of
9 : 2 5 AM 15 these claims in Suffolk County I think that would just cut
9 : 2 5 AM 16 across all the cases. So I'm not going to issue random ones.

9 : 2 5 AM 17 So what did counsel think about -- first of all,
9 : 2 5 AM 18 did the Defense Coordinating Committee endorse this motion to
9 : 2 5 AM 19 dismiss?

9 : 2 5 AM 20 **MR. PETROSINELLI:** No, Your Honor, we -- because of
9 : 2 5 AM 21 the way the CMO was written, as you pointed out, the County of
9 : 2 6 AM 22 Suffolk called us and asked us what we thought, and to be quite
9 : 2 6 AM 23 candid with the Court, the leadership advised them that we
9 : 2 6 AM 24 didn't think a Rule 12 motion was appropriate at this point,
9 : 2 6 AM 25 because we don't want to be litigating individual motions. And

9 : 2 6 A M 1 SO --

9 : 2 6 A M 2 THE COURT: It's just going to be chaos. We've got
9 : 2 6 A M 3 some really important issues to do that may well -- I mean, I
9 : 2 6 A M 4 think they're more summary judgment motions than they are
9 : 2 6 A M 5 really motions to dismiss, and we need to do them in a sort of
9 : 2 6 A M 6 thoughtful way. I mean, there are even some jurisdictional
9 : 2 6 A M 7 issues that are going to require discovery.

9 : 2 6 A M 8 And what is your -- what is the Defense
9 : 2 6 A M 9 Coordinating Committee's view of the fact that I'm thinking
9 : 2 6 A M 10 about just establishing -- changing the rule to say that if you
9 : 2 6 A M 11 don't sign it, if your committee doesn't sign it, that they
9 : 2 6 A M 12 have to come to me to get permission to file it?

9 : 2 6 A M 13 MR. PETROGINELLI: That would be most welcome to us,
9 : 2 6 A M 14 Your Honor.

9 : 2 6 A M 15 THE COURT: Same thing for the plaintiffs. What do
9 : 2 6 A M 16 y'all think about that?

9 : 2 7 A M 17 MR. THOMPSON: Your Honor, we believe this motion is
9 : 2 7 A M 18 premature. It was improvidently filed, and frankly I thought
9 : 2 7 A M 19 the CMO required a -- some sort of pre-approval to file, and
9 : 2 7 A M 20 so --

9 : 2 7 A M 21 THE COURT: I thought so too frankly. Ms. Niosi and
9 : 2 7 A M 22 I were looking this morning, because we thought that was a
9 : 2 7 A M 23 requirement as well.

9 : 2 7 A M 24 MR. THOMPSON: We don't oppose that.

9 : 2 7 A M 25 THE COURT: I kind of like support the committees.

9 : 2 7 A M 1 There are times where the leadership committee may have it
9 : 2 7 A M 2 wrong. I mean, they just are keeping something out that needs
9 : 2 7 A M 3 to be raised and addressed, and that's why I have them come to
9 : 2 7 A M 4 me, because if they present it, and they say, "No, no, it's too
9 : 2 7 A M 5 early," or whatever and it's like really distinct and it's
9 : 2 7 A M 6 important to the party, I want to hear about it. I may well
9 : 2 7 A M 7 say, "You got to go back to your committee. we'll do it at a
9 : 2 7 A M 8 later point," but -- but what I want to do is support the
9 : 2 7 A M 9 leadership, because it's just too many cases, too many issues
9 : 2 7 A M 10 to have 106 different individual actors. I mean, that's not
9 : 2 8 A M 11 what doing an MDL is all about, that you're trying to have
9 : 2 8 A M 12 these issues.

9 : 2 8 A M 13 So I'm not -- so here's what I'm going to do.
9 : 2 8 A M 14 I'm going to enter -- I'm going to enter a CMO that amends
9 : 2 8 A M 15 paragraph 42 that requires endorsement by the -- A, it will
9 : 2 8 A M 16 require endorsement by the committee, the defense coordinating
9 : 2 8 A M 17 committee, and to the extent the substance of the motion
9 : 2 8 A M 18 applies to other cases, it needs to all be filed at one time.
9 : 2 8 A M 19 I mean, those are just sort of I think generally what we would
9 : 2 8 A M 20 do anyway, but I want to impose that.

9 : 2 8 A M 21 I'm going to deny the motion without prejudice,
9 : 2 8 A M 22 have them go back to you. If you don't sign it, they can file
9 : 2 8 A M 23 a motion with me. I think it's early. I think it's way too
9 : 2 8 A M 24 early for this, and -- yes? I see someone standing.

9 : 2 8 A M 25 MS. KNAUER: Yes, Elizabeth Knauer, attorney for the

9 : 2 8 AM 1 Port Authority --

9 : 2 8 AM 2 THE COURT REPORTER: I'm sorry. Could you come to
9 : 2 8 AM 3 the microphone?

9 : 2 8 AM 4 THE COURT: Come to the microphone if you could,
9 : 2 8 AM 5 please. It's like trying to hide in the back row of law school
9 : 2 9 AM 6 class, you know. We're not going to let you do that. Yes,
9 : 2 9 AM 7 ma'am.

9 : 2 9 AM 8 MS. KNAUER: I'm Elizabeth Knauer representing the
9 : 2 9 AM 9 Port Authority of New York and New Jersey, and we're also
9 : 2 9 AM 10 liaison counsel for the nonmanufacturing defendants.

9 : 2 9 AM 11 I just wanted to -- I understand the Court's
9 : 2 9 AM 12 concern about multiple motions to dismiss being filed. In our
9 : 2 9 AM 13 case, we do think that we may have some sort of unique defenses
9 : 2 9 AM 14 that we may want to present to the motion to dismiss. So I
9 : 2 9 AM 15 would just request that the Court have -- within the modified
9 : 2 9 AM 16 order include some means of requesting permission from the
9 : 2 9 AM 17 Court --

9 : 2 9 AM 18 THE COURT: oh, we will definitely do that, but --

9 : 2 9 AM 19 MS. KNAUER: -- if the DCC doesn't agree.

9 : 2 9 AM 20 THE COURT: Let me say something about it. MDL is
9 : 2 9 AM 21 different from litigation where people will come in, and
9 : 2 9 AM 22 they'll trim down the complaint a little bit here and there.
9 : 2 9 AM 23 The case never goes away. It's just like these sort of random,
9 : 2 9 AM 24 unimportant claims that are not really central to the -- to the
9 : 2 9 AM 25 lawsuit are -- are -- you know, people try to get rid of them.

9 : 3 0 A M 1 In an MDL if everybody was doing that, it would be like chaos.
9 : 3 0 A M 2 I mean, you'd have -- it would just be -- and it's not
9 : 3 0 A M 3 important. It's not important to the result here, because the
9 : 3 0 A M 4 case is not going to go away on a motion to dismiss. So I'm
9 : 3 0 A M 5 trying to not only maximize the time all counsel have to
9 : 3 0 A M 6 spend -- because let me say, you come in, and you do a motion
9 : 3 0 A M 7 to dismiss on some of these core issues, the whole defense
9 : 3 0 A M 8 committee has got to get involved, because if they lose that,
9 : 3 0 A M 9 you know, those -- some of their -- it may be one of their core
9 : 3 0 A M 10 issues, and the plaintiffs say, "Oh, no. We can't let the case
9 : 3 0 A M 11 go." You've now redirected the entire litigation where I'm
9 : 3 0 A M 12 trying to get them going on discovery and trying to deal with
9 : 3 0 A M 13 some of these threshold issues about immunity and so forth, and
9 : 3 0 A M 14 you got us off doing an issue that we don't want to do yet. I
9 : 3 0 A M 15 know that's not the intent, but this is really different.

9 : 3 1 A M 16 So the way we do this is you go to leadership
9 : 3 1 A M 17 team. You talk to them. If you feel strongly, then you can
9 : 3 1 A M 18 make a motion to me. I'm going to tell you that my bias is in
9 : 3 1 A M 19 favor of supporting committee decisions, because without
9 : 3 1 A M 20 coordination, it's very hard to run an MDL, okay? So it's got
9 : 3 1 A M 21 to be a really compelling reason to do it.

9 : 3 1 A M 22 Now, I'll eventually get to it. We'll get to
9 : 3 1 A M 23 it, but it just is a question of when we get to it, and so --
9 : 3 1 A M 24 and I will tell you this is very different from your normal
9 : 3 1 A M 25 litigation. There's a certain culture to this, and I don't

9 : 3 1 A M 1 know how much personal experience you have with that, but I
9 : 3 1 A M 2 wasn't surprised what the defense lawyers were saying, you
9 : 3 1 A M 3 know, that, "We were surprised. We tried to urge them not to
9 : 3 1 A M 4 do it."

9 : 3 1 A M 5 MS. KNAUER: Well, and I will say that the County of
9 : 3 1 A M 6 Suffolk did not -- although we are liaison counsel for the
9 : 3 1 A M 7 nonmanufacturing defendants, which includes them, they did not
9 : 3 2 A M 8 actually come to me first.

9 : 3 2 A M 9 THE COURT: So who -- is someone here representing
9 : 3 2 A M 10 the County of Suffolk?

9 : 3 2 A M 11 MS. KNAUER: No, they are not present.

9 : 3 2 A M 12 THE COURT: They just filed it and ran?

9 : 3 2 A M 13 MR. OLSEN: Your Honor, we did hear from them in
9 : 3 2 A M 14 advance.

9 : 3 2 A M 15 THE COURT: I saw that. They consulted, and, you
9 : 3 2 A M 16 know, y'all urged them not to do it. It's not bad. I mean,
9 : 3 2 A M 17 I'm going to get to these issues. It's just how are we going
9 : 3 2 A M 18 to run this thing? And I think kind of making a little bit of
9 : 3 2 A M 19 a big deal about it right now just kind of highlights that we
9 : 3 2 A M 20 need to support our leadership committees on both the plaintiff
9 : 3 2 A M 21 and defense side.

9 : 3 2 A M 22 MS. KNAUER: And that's all understood. I just
9 : 3 2 A M 23 wanted to ensure that there would be some procedure --

9 : 3 2 A M 24 THE COURT: There is definitely going to be a
9 : 3 2 A M 25 procedure. I will always hear you, and at the end of every --

9 : 3 2 A M 1 not only can you file it, my CMO will say you -- any party that
9 : 3 2 A M 2 does not get permission may file a motion with the Court. That
9 : 3 2 A M 3 will always be available. We meet here every month. My last
9 : 3 3 A M 4 statement to you each month, "Is there any other issue anyone
9 : 3 3 A M 5 wishes to raise?" So you'll always have the opportunity to
9 : 3 3 A M 6 have access to me.

9 : 3 3 A M 7 MS. KNAUER: And so there would be a motion to --

9 : 3 3 A M 8 THE COURT: Permission to file.

9 : 3 3 A M 9 MS. KNAUER: For permission to file the motion.

9 : 3 3 A M 10 THE COURT: Yes.

9 : 3 3 A M 11 MS. KNAUER: Thank you, Your Honor.

9 : 3 3 A M 12 THE COURT: Thank you. Okay. Folks, you know, we --
9 : 3 3 A M 13 of course, my view of the world is 30 days ago I lifted the
9 : 3 3 A M 14 stay on discovery, so I want to know when y'all are going to
9 : 3 3 A M 15 finish, right?

9 : 3 3 A M 16 MR. PETROGINELLI: Mr. Dukes said you might ask that
9 : 3 3 A M 17 today.

9 : 3 3 A M 18 THE COURT: Y'all were like 2000 never, you know. So
9 : 3 3 A M 19 let me just -- again, you know, I am not willing to bifurcate
9 : 3 3 A M 20 discovery, because every time I do that, the lawyers are
9 : 3 3 A M 21 calling me from depositions saying someone asked a question
9 : 3 3 A M 22 outside, and it drives me crazy, so I don't do that.

9 : 3 3 A M 23 But I do think we need to be focused on some
9 : 3 3 A M 24 really important issues. I talked about this a little bit last
9 : 3 4 A M 25 month. Let me say again. I think among the issues that I just

9 : 3 4 AM 1 think prudently in trying to organize the MDL in a meaningful
9 : 3 4 AM 2 way, we've got to address -- we got to do the discovery on
9 : 3 4 AM 3 governmental contractor immunity. And let me say, it's lot of
9 : 3 4 AM 4 issues and a lot of facts, and it goes into history going back
9 : 3 4 AM 5 to the origin of the -- of the creation of the AFFF, and, you
9 : 3 4 AM 6 know, y'all got some work to do, and there are issues about
9 : 3 4 AM 7 disclosure of risk. There are kinds of issues in government
9 : 3 4 AM 8 contractor immunity, and it's going to take some work, and
9 : 3 4 AM 9 y'all need to get on this. You know, y'all need to be getting
9 : 3 4 AM 10 whatever documents might be available, and then you got to
9 : 3 4 AM 11 get -- you got to take depositions. You're going to run into
9 : 3 4 AM 12 situations where people involved are no longer alive. You're
9 : 3 4 AM 13 going to have all kind of issues. This is like really hard
9 : 3 4 AM 14 work, and I want y'all to get on it, and I don't want someone
9 : 3 5 AM 15 filing a motion to dismiss on that basis right this moment,
9 : 3 5 AM 16 because we got too much work to do on that.

9 : 3 5 AM 17 The -- another issue which -- and I said this
9 : 3 5 AM 18 before. And I know y'all are already working on the fact
9 : 3 5 AM 19 sheets on the water districts, because I know the defense wants
9 : 3 5 AM 20 to know what's the score there, how much critical information.
9 : 3 5 AM 21 I think that is a really important threshold kind of set of
9 : 3 5 AM 22 issues to deal with. You know, the -- I think the hardest
9 : 3 5 AM 23 issue for plaintiffs is, you know, individual causation.
9 : 3 5 AM 24 General causation is sort of -- is not as arduous an issue.
9 : 3 5 AM 25 But there appears to be a significant scientific dispute about

9 : 3 5 AM 1 what threshold of PFOA and PFOS in the water poses a health
9 : 3 5 AM 2 risk, and from the materials both sides provided me, I'm aware
9 : 3 5 AM 3 of one time the EPA said it was 400 parts per trillion. Then
9 : 3 6 AM 4 they said it was 70 parts per trillion. A committee of the CDC
9 : 3 6 AM 5 says it's 10 or 11 parts per trillion. New Jersey says
9 : 3 6 AM 6 something in that same range. It's a very dynamic moment right
9 : 3 6 AM 7 now, and we need to be doing work about what is the underlying
9 : 3 6 AM 8 scientific bases for -- for -- for those numbers? That is
9 : 3 6 AM 9 really important.

9 : 3 6 AM 10 And I said before, you know, the one drop, you
9 : 3 6 AM 11 know, one part per trillion is -- is a single -- one part per
9 : 3 6 AM 12 trillion is one single drop in a swimming pool the size of a
9 : 3 6 AM 13 football field 43 feet deep, okay? So 10 parts per trillion is
9 : 3 6 AM 14 literally 10 drops in that. Now, if there's a sound scientific
9 : 3 6 AM 15 basis for that, we need to know about that. If there's an
9 : 3 7 AM 16 argument about it, we need to be developing that. That's like
9 : 3 7 AM 17 -- when we get to science day, I'm going to talk to you about
9 : 3 7 AM 18 that. I think this is like really an important threshold
9 : 3 7 AM 19 issue.

9 : 3 7 AM 20 The C8 scientific panels have very interesting
9 : 3 7 AM 21 information, but the level of exposure there was much more
9 : 3 7 AM 22 intense than we're talking about here in the water supply, and
9 : 3 7 AM 23 we need to know -- you know, I'm just very curious about what
9 : 3 7 AM 24 was that Center for Disease Control panel, what were they
9 : 3 7 AM 25 relying on when they talked about 10 parts per trillion? What

9 : 3 7 AM 1 was that information? And is it reliable? Are there -- if
9 : 3 7 AM 2 it's disputed, how important is -- is duration? I mean, there
9 : 3 7 AM 3 are all these issues, and we'll also -- I'm going to mention
9 : 3 7 AM 4 that on science day. Y'all got to get to work on all of that,
9 : 3 7 AM 5 and those issues will, of course, go into every other part of
9 : 3 7 AM 6 this case. And so I think we need to get on with the discovery
9 : 3 8 AM 7 on all of that that really go to the water districts.

9 : 3 8 AM 8 I know -- I'm not trying to stop other things,
9 : 3 8 AM 9 but I just think that is a good focus and, you know, to the
9 : 3 8 AM 10 extent that plaintiffs can't sustain their proof on that issue,
9 : 3 8 AM 11 then you got real problems on the other issues. If they can,
9 : 3 8 AM 12 that may be a building block to other claims.

9 : 3 8 AM 13 So I'm just saying I would -- I think in a
9 : 3 8 AM 14 potential litigation raising as vast a number of issues as
9 : 3 8 AM 15 here, if you try to swallow it whole, you just choke. You try
9 : 3 8 AM 16 to narrow it down to something. And if y'all disagree with
9 : 3 8 AM 17 that, I don't want to run your litigation, but it just strikes
9 : 3 8 AM 18 me looking at that, that's an issue as the presiding judge it
9 : 3 8 AM 19 looks like really interesting to me and really will answer a
9 : 3 8 AM 20 lot of questions down the road that if we get answers to those
9 : 3 8 AM 21 issues, we'll come to understand.

9 : 3 8 AM 22 So I would like y'all to be conferring about how
9 : 3 9 AM 23 we're going to get there. You know, what is our discovery plan
9 : 3 9 AM 24 here? I didn't issue a scheduling order or anything. I don't
9 : 3 9 AM 25 want to do that right now. But what I do want is to sort of

9 : 3 9 AM 1 hear y'all's plans how are we going to get to this? And it may
9 : 3 9 AM 2 well be that, you know, the plaintiffs will have their own
9 : 3 9 AM 3 plan, and the defendants will have their plan. I don't expect
9 : 3 9 AM 4 them to have the same plans, but they have different -- but,
9 : 3 9 AM 5 you know, to get on with -- and to share with each other so
9 : 3 9 AM 6 that we can -- so that I know that documents are being
9 : 3 9 AM 7 exchanged, depositions are being taken. we're moving on this,
9 : 3 9 AM 8 okay?

9 : 3 9 AM 9 Now let me talk to you about science day for a
9 : 3 9 AM 10 second. This is -- apparently has been the notion that you --
9 : 3 9 AM 11 that the attorneys are going to litigate over what I'm going to
9 : 3 9 AM 12 ask for for science day. That is a mistake, okay? This is for
9 : 3 9 AM 13 me, not for y'all. And I -- I'm considering everything y'all
9 : 3 9 AM 14 wrote. Thank you very much for that. Some of them were good
9 : 3 9 AM 15 ideas. But let me mention to you some things, and I'm going to
9 : 4 0 AM 16 issue an order about what -- the scope of science day, because
9 : 4 0 AM 17 it's still a work in progress in my own head, and I'm going to
9 : 4 0 AM 18 go over with some care the recent responses of counsel which
9 : 4 0 AM 19 laid out different ideas they thought that I might want to
9 : 4 0 AM 20 consider.

9 : 4 0 AM 21 One of them is the issue I just raised about the
9 : 4 0 AM 22 scientific bases of these varying numbers, and I think that's a
9 : 4 0 AM 23 really important issue. It goes to the issue is at what level
9 : 4 0 AM 24 of this exposure poses human health risks? That's really the
9 : 4 0 AM 25 question. And I will tell you that all those articles both of

9 : 4 0 AM 1 you gave me, none of them really addressed that question about
9 : 4 0 AM 2 in the water supply, you know, the levels -- at what levels,
9 : 4 0 AM 3 and it may well be that we're literally at the cutting edge of
9 : 4 0 AM 4 science on this. I don't know, but I want to -- I mean, we're
9 : 4 1 AM 5 not completely beyond the frontier, because you got groups
9 : 4 1 AM 6 talking about levels that are very low. I mean, I don't think
9 : 4 1 AM 7 they're taking a dartboard out and throwing the dart at a wall
9 : 4 1 AM 8 and hitting a number. They got a reason for it. I want to
9 : 4 1 AM 9 know about that. And if plaintiffs love that number and the
9 : 4 1 AM 10 defendants think it's not sound science, I want to hear about
9 : 4 1 AM 11 that too.

9 : 4 1 AM 12 I want to know about -- I've read different --
9 : 4 1 AM 13 in the materials I've reviewed, I am aware that there has been
9 : 4 1 AM 14 some documentation about levels of exposure in the water
9 : 4 1 AM 15 supply, contamination in the water supply. I think I read
9 : 4 1 AM 16 somewhere there were like 70 sites and 19 of them were over the
9 : 4 1 AM 17 EPA number of 70 parts per trillion. I'd like to know what
9 : 4 2 AM 18 those specific numbers are at those sites, because, you know,
9 : 4 2 AM 19 are they over 10 parts per trillion? Are they under 10 parts
9 : 4 2 AM 20 per trillion? I'm not saying I love that number. I'm just
9 : 4 2 AM 21 saying, you know, the different standards, what actually is the
9 : 4 2 AM 22 level there? And do we have any idea about duration of that,
9 : 4 2 AM 23 how long it's been there? And has it gone up or down, or has
9 : 4 2 AM 24 it been unchanged?

9 : 4 2 AM 25 So that whole issue about what is our knowledge

9 : 4 2 A M 1 about actual, you know, contamination of the water supply in
9 : 4 2 A M 2 those various sites.

9 : 4 2 A M 3 Another area of interest to me is if we were to
9 : 4 2 A M 4 do medical monitoring, are there tests available to efficiently
9 : 4 2 A M 5 and economically evaluate the levels of PFOS or PFOA in the
9 : 4 2 A M 6 blood serum? Are there tests to suggest that there are
9 : 4 2 A M 7 complications from that exposure? I was told last month about
9 : 4 3 A M 8 there was a physician in New Jersey with a screening protocol.
9 : 4 3 A M 9 I mean, I would imagine you might have something where you
9 : 4 3 A M 10 would have an initial screening protocol, and then if certain
9 : 4 3 A M 11 things came out indicating an issue, there would be some
9 : 4 3 A M 12 further follow-up. I mean, I don't want to reinvent the wheel
9 : 4 3 A M 13 on this if we're going to do it. Are there people out there
9 : 4 3 A M 14 thinking about this, talking about this? Is that a -- is there
9 : 4 3 A M 15 a way to do it?

9 : 4 3 A M 16 I've told you before that if we explore this --
9 : 4 3 A M 17 and I'm not completely committed to doing it -- we might pick
9 : 4 3 A M 18 one or two sites and see if it tells us anything worth having.
9 : 4 3 A M 19 You know, is this information worth having?

9 : 4 3 A M 20 I will tell you that one of the challenges of
9 : 4 3 A M 21 ever proving individual causation is where a health
9 : 4 3 A M 22 complication arises and may be related to a toxic exposure or
9 : 4 3 A M 23 to a thousand other reasons, and how one gets to saying most
9 : 4 4 A M 24 probably is caused by the exposure is always one of those
9 : 4 4 A M 25 challenges. And so I'm kind of interested are there tests out

9 : 4 4 AM 1 there that might assist us in that, or are we going to be
9 : 4 4 AM 2 looking at other, you know, less direct evidence?

9 : 4 4 AM 3 And related to that, are there diseases or
9 : 4 4 AM 4 conditions uniquely caused by PFOA or PFOS contamination or
9 : 4 4 AM 5 ones which arise rarely in the absence of exposure among that
9 : 4 4 AM 6 sort of age group affected? I remember in Fen-Phen litigation,
9 : 4 4 AM 7 primary pulmonary hypertension was very rare for young people,
9 : 4 4 AM 8 and suddenly they had all of these cases, and all of them were
9 : 4 4 AM 9 on Fen-Phen. Is there something like that here?

9 : 4 4 AM 10 If they're -- if there are common health
9 : 4 4 AM 11 conditions caused or exacerbated by PFOA or PFOS exposure, are
9 : 4 5 AM 12 there methods to demonstrate that it's likely related to that
9 : 4 5 AM 13 exposure?

9 : 4 5 AM 14 Another area is -- for me for science day, I'm
9 : 4 5 AM 15 interested in it, is remediation methods, costs and
9 : 4 5 AM 16 effectiveness. What's it involve? What are the methods?

9 : 4 5 AM 17 And another issue which seems to be disputed
9 : 4 5 AM 18 here, are there alternatives to PFOA and PFOS that were
9 : 4 5 AM 19 available -- are available in this product, and were they
9 : 4 5 AM 20 previously available? You know, that could relate to a lot of
9 : 4 5 AM 21 issues, including governmental contractor immunity.

9 : 4 5 AM 22 So those are issues -- those are six issues that
9 : 4 5 AM 23 just to me are things -- and I will issue an order that sets
9 : 4 5 AM 24 forth these things that I'm interested in science day, and I
9 : 4 6 AM 25 will selfishly say it, the science day is for me, not for y'all

9 : 4 6 AM 1 to spoon feed me. Y'all already have given me the spoon
9 : 4 6 AM 2 feeding. I loved that there were ten articles each side, and
9 : 4 6 AM 3 none of them overlapped each other. They're like two different
9 : 4 6 AM 4 parallel universes there. And what I'm going to try to do is
9 : 4 6 AM 5 have a third line which is going to be stuff we all sort of
9 : 4 6 AM 6 recognize, may get us closer to answering those questions.

9 : 4 6 AM 7 I will also say something that I doubt I need
9 : 4 6 AM 8 to: That I won't be surprised in the course of this litigation
9 : 4 6 AM 9 that there will be new studies and new articles and new
9 : 4 6 AM 10 information that comes forward that will enhance our
9 : 4 6 AM 11 understanding, because I think we are in many ways at the
9 : 4 6 AM 12 frontier here on some of these medical and scientific issues.
9 : 4 6 AM 13 Please provide them to me promptly. I'm interested. You know,
9 : 4 6 AM 14 I'm trying to keep up with the literature, and we'll read them.
9 : 4 6 AM 15 Don't flood me with every time there's something that's a
9 : 4 6 AM 16 random footnote or something, but if there's something that
9 : 4 7 AM 17 seems to be significant and -- you know, I've been in a lot of
9 : 4 7 AM 18 litigation like this where material studies come in that are
9 : 4 7 AM 19 really pretty important, important for the experts and so
9 : 4 7 AM 20 forth.

9 : 4 7 AM 21 Okay. Let me talk about the -- I saw somewhere
9 : 4 7 AM 22 y'all were debating over the limit of 25 interrogatories and
9 : 4 7 AM 23 Rule 33(a). The limit of 25 interrogatories will not apply to
9 : 4 7 AM 24 this litigation, does not apply. You know, we got 106 cases
9 : 4 7 AM 25 right now. We have thousands of plaintiffs. It doesn't apply.

9 : 4 7 AM 1 Now, here's the -- what I'm going to ask y'all
9 : 4 7 AM 2 to think about. Should there be a limit? I don't want abuse.
9 : 4 7 AM 3 I don't want trying to bury the other side in interrogatories.
9 : 4 7 AM 4 The 25 interrogatory rule is there for a reason. I've lifted
9 : 4 8 AM 5 it in many complex cases, because it doesn't make sense. You
9 : 4 8 AM 6 need more than that, but I want the parties to consult should
9 : 4 8 AM 7 we have a limit, and all the limit is is you come to me if you
9 : 4 8 AM 8 have more. And it may be useful to do that, but I will -- at
9 : 4 8 AM 9 the next status conference, I want y'all to come to me with a
9 : 4 8 AM 10 joint proposal, or if not, your separate thoughts about that,
9 : 4 8 AM 11 but the 25 interrogatory limit will not apply, and the next CMO
9 : 4 8 AM 12 will say that.

9 : 4 8 AM 13 Okay. That's my list. From the plaintiff, any
9 : 4 8 AM 14 thoughts, ideas, concerns?

9 : 4 8 AM 15 **MR. LONDON:** One second, Your Honor. I'm just
9 : 4 8 AM 16 looking at our joint report to make sure we did cover
9 : 4 8 AM 17 everything.

9 : 4 9 AM 18 **THE COURT:** I used your report to prepare my notes.

9 : 4 9 AM 19 **MR. LONDON:** Well, you did an excellent job, Your
9 : 4 9 AM 20 Honor.

9 : 4 9 AM 21 **THE COURT:** I didn't do it -- I'm not kind of like
9 : 4 9 AM 22 random abstract artist or something.

9 : 4 9 AM 23 **MR. LONDON:** It was a good job then, Your Honor. I
9 : 4 9 AM 24 think you covered it all.

9 : 4 9 AM 25 **MR. THOMPSON:** The -- I think the United States, that

9 : 4 9 AM 1 issue is -- well, it's for them to say, but that's still in the
9 : 4 9 AM 2 report.

9 : 4 9 AM 3 **THE COURT:** Okay. Mr. Petrosinelli?

9 : 4 9 AM 4 **MR. PETROGINELLI:** Nothing from the defense, Your
9 : 4 9 AM 5 Honor.

9 : 4 9 AM 6 **THE COURT:** Ms. Williams, give me a little status
9 : 4 9 AM 7 report on production of documents and where all that is with
9 : 4 9 AM 8 the government.

9 : 4 9 AM 9 **THE WITNESS:** Well, we had been looking into Air
9 : 4 9 AM 10 Force and Defense Logistic Agency's supply records. We found a
9 : 4 9 AM 11 private database which has been collecting documents that would
9 : 4 9 AM 12 normally be destroyed in the government process, and so we're
9 : 4 9 AM 13 getting that information and how to search it for the parties.

9 : 4 9 AM 14 **THE COURT:** That will -- that would be of great
9 : 4 9 AM 15 benefit to everybody. And how -- how did there happen to be a
9 : 4 9 AM 16 private database for that?

9 : 5 0 AM 17 **MS. WILLIAMS:** I'm guessing, Your Honor, but I think
9 : 5 0 AM 18 it's because for the Defense Logistics Agency's documents,
9 : 5 0 AM 19 there's a market. There are people who are interested who want
9 : 5 0 AM 20 to know like how much does this document sell for? So they're
9 : 5 0 AM 21 able to collect all of those documents and then sell them back
9 : 5 0 AM 22 to the defense supplier at a profit, because they have
9 : 5 0 AM 23 information.

9 : 5 0 AM 24 **THE COURT:** Yes. I get that. That makes plenty of
9 : 5 0 AM 25 sense. I know at some point the government is going to want me

9 : 5 0 AM 1 to address governmental immunity; is that a good guess?

9 : 5 0 AM 2 MS. WILLIAMS: That is an excellent guess, Your
9 : 5 0 AM 3 Honor.

9 : 5 0 AM 4 THE COURT: Yes, thank you. And we will. I'm not
9 : 5 0 AM 5 neglecting the issue, but let's -- are there factual issues
9 : 5 0 AM 6 relevant to that -- to such a motion?

9 : 5 0 AM 7 MS. WILLIAMS: Yes, Your Honor.

9 : 5 0 AM 8 THE COURT: Well, I think you may want to alert the
9 : 5 0 AM 9 parties that at some point you may be making motions, and that
9 : 5 0 AM 10 they need to get on with discovery.

9 : 5 0 AM 11 MS. WILLIAMS: Yes, Your Honor.

9 : 5 1 AM 12 THE COURT: Because what I -- you know, I've talked
9 : 5 1 AM 13 about governmental contractor immunity, but to the extent there
9 : 5 1 AM 14 are issues, y'all ought to be consulting with the government.
9 : 5 1 AM 15 Now, I'm wondering. I know the parties got the *Be77* discovery
9 : 5 1 AM 16 and other things. Are there things from the government that
9 : 5 1 AM 17 you are pursuing now that you have not received?

9 : 5 1 AM 18 MR. THOMPSON: Judge, we've actually had an
9 : 5 1 AM 19 opportunity to confer with the government and with regard to
9 : 5 1 AM 20 various databases, and the voluntary cooperation has been very
9 : 5 1 AM 21 gratifying to date. So we don't have any complaints. As we go
9 : 5 1 AM 22 forward, some of that patina may wear off, but we may --

9 : 5 1 AM 23 THE COURT: Right. We may have our disagreements,
9 : 5 1 AM 24 but I think everybody is very impressed with Ms. Williams'
9 : 5 1 AM 25 diligence here. So --

9 : 5 1 A M 1 **MR. THOMPSON:** Yes, sir.

9 : 5 1 A M 2 **MR. OLSEN:** Your Honor, we too appreciate -- we've
9 : 5 1 A M 3 been perfectly cooperative with Ms. Williams. The plaintiffs
9 : 5 1 A M 4 have issued master discovery that will apply to everyone,
9 : 5 1 A M 5 including the government. We are looking at that discovery to
9 : 5 2 A M 6 see if there's anything additional that the defendants need
9 : 5 2 A M 7 from the government, and we will work with them as we evaluate
9 : 5 2 A M 8 that.

9 : 5 2 A M 9 **MS. WILLIAMS:** And unfortunately, Your Honor, the
9 : 5 2 A M 10 cooperation may be coming to an end, because the government
9 : 5 2 A M 11 does have immunity defenses to discovery. So while I have to
9 : 5 2 A M 12 help people direct to third-party discovery, there are
9 : 5 2 A M 13 thousands of claims which are not against the United States in
9 : 5 2 A M 14 this lawsuit. As a party, we have an immunity to suit, which
9 : 5 2 A M 15 is different than the immunity that defendants are pursuing.
9 : 5 2 A M 16 That's in the law of the Fourth Circuit a preemption defense,
9 : 5 2 A M 17 so we're differently situated that way.

9 : 5 2 A M 18 **THE COURT:** Are you suggesting that Rule 45 does not
9 : 5 2 A M 19 apply to the government even if it wasn't a party?

9 : 5 2 A M 20 **MS. WILLIAMS:** No, Rule 45 is the rule that should be
9 : 5 2 A M 21 used, Your Honor, because the --

9 : 5 2 A M 22 **THE COURT:** But only if you're not a party. As long
9 : 5 2 A M 23 as you're a party, you're subject to discovery.

9 : 5 2 A M 24 **MS. WILLIAMS:** Not -- the United States is only
9 : 5 2 A M 25 subject to jurisdictional threshold issues. When we have a

9 : 5 2 AM 1 jurisdictional defense, it's a threshold issue, and that
9 : 5 2 AM 2 immunity has to be resolved before any merits-based discovery
9 : 5 3 AM 3 on us.

9 : 5 3 AM 4 **THE COURT:** But even if you were to get -- have
9 : 5 3 AM 5 immunity, you would still be subject to Rule 45.

9 : 5 3 AM 6 **MS. WILLIAMS:** Yes, Your Honor. And in those cases
9 : 5 3 AM 7 where we're not a party, non-party discovery is not affected
9 : 5 3 AM 8 and not limited.

9 : 5 3 AM 9 **THE COURT:** I'm sorry?

9 : 5 3 AM 10 **MS. WILLIAMS:** Non-party discovery is not affected
9 : 5 3 AM 11 and limited in the same way that party discovery is.

9 : 5 3 AM 12 **THE COURT:** I recognize that. I was aware of that,
9 : 5 3 AM 13 but it doesn't -- it's not absent either, and to the extent
9 : 5 3 AM 14 there are relevant document -- relevant -- documents relevant
9 : 5 3 AM 15 to a case, even if the government is not a party, as a -- it
9 : 5 3 AM 16 has certain duties under -- I know there are issues here about
9 : 5 3 AM 17 how we get to them and what standards we use and all of that,
9 : 5 3 AM 18 but they're not immune. They're not off limits. That's for
9 : 5 3 AM 19 the Court to determine whether they fall within Rule 45 and
9 : 5 3 AM 20 applicable standards in my circuit, right? I mean --

9 : 5 3 AM 21 **MS. WILLIAMS:** Yes, Your Honor.

9 : 5 3 AM 22 **THE COURT:** So -- but I think to the extent that the
9 : 5 4 AM 23 government doesn't have any heartburn about something that's
9 : 5 4 AM 24 highly probative to this case and to the public health, it
9 : 5 4 AM 25 should not be holding them back on some principle that -- that,

9 : 5 4 AM 1 you know, somehow we have -- you know, we have immunity.

9 : 5 4 AM 2 You're a party right now. Some of these jurisdictional issues,

9 : 5 4 AM 3 I would read them pretty broadly as to the applicability here.

9 : 5 4 AM 4 So, you know, I would -- and to the extent we

9 : 5 4 AM 5 encounter a situation where you're refusing, I want that to be

9 : 5 4 AM 6 promptly brought to my attention, because I will immediately

9 : 5 4 AM 7 address it.

9 : 5 4 AM 8 But, you know, we're in the search for the truth

9 : 5 4 AM 9 here, and frankly, Ms. Williams, the government's been way

9 : 5 4 AM 10 ahead on some of these issues, and I have not seen the

9 : 5 4 AM 11 government's view as in any way obstructionist, but just to the

9 : 5 4 AM 12 contrary, very open. But when you have critical information

9 : 5 5 AM 13 that's essential to the public health, the government is going

9 : 5 5 AM 14 to have a pretty tough time trying to keep that information out

9 : 5 5 AM 15 of the -- beyond the reach of Rule 45. I mean, whatever the

9 : 5 5 AM 16 standard, it's going to be pretty tough.

9 : 5 5 AM 17 So I urge y'all to continue to voluntarily

9 : 5 5 AM 18 cooperate, and to the extent where you reach a point where you

9 : 5 5 AM 19 can't go any further than that, I'll address those issues,

9 : 5 5 AM 20 okay?

9 : 5 5 AM 21 MS. WILLIAMS: Yes, Your Honor. And we're not at

9 : 5 5 AM 22 that point now. It's just important to lay out the --

9 : 5 5 AM 23 THE COURT: Listen, I know the Department of

9 : 5 5 AM 24 Justice's view, you know. I don't have a dog in that fight.

9 : 5 5 AM 25 I'm just -- but I am -- as the presiding judge over this, I

9 : 5 5 AM 1 want the parties to have the relevant information. To the
9 : 5 5 AM 2 extent the claims of the plaintiffs have merit, there is a huge
9 : 5 5 AM 3 public health issue here, and, you know -- and I'm not going to
9 : 5 5 AM 4 be the guy that suppresses the relevant evidence and that
9 : 5 6 AM 5 doesn't allow this information to come forward. There are a
9 : 5 6 AM 6 lot of interests here having this information fully addressed.
9 : 5 6 AM 7 If there's no merit to it, that's fine. If there is merit to
9 : 5 6 AM 8 it, this is the vehicle we have to discover that information.
9 : 5 6 AM 9 That's what discovery is, right? It's just to discover that
9 : 5 6 AM 10 information.

9 : 5 6 AM 11 So I have nothing but praise, Ms. Williams, for
9 : 5 6 AM 12 you up to this point, and if we reach a point where we're
9 : 5 6 AM 13 hitting a wall, let's all talk about it. Okay?

9 : 5 6 AM 14 **MS. WILLIAMS:** Yes, Your Honor.

9 : 5 6 AM 15 **THE COURT:** Okay. From the defense, any additional
9 : 5 6 AM 16 matters?

9 : 5 6 AM 17 **MR. PETROGINELLI:** No, Your Honor.

9 : 5 6 AM 18 **THE COURT:** Very good. Well, I noticed everyone
9 : 5 6 AM 19 seemed fascinated last night with the fact that there was a
9 : 5 6 AM 20 dungeon in the -- in the venue for the -- of the cocktail
9 : 5 6 AM 21 party. I didn't notice anyone wandering down there in the fear
9 : 5 6 AM 22 they might not return, but I doubt they called it a dungeon in
9 : 5 7 AM 23 1780, you know? Though I'm sure it was like, you know -- it
9 : 5 7 AM 24 wasn't like staying at the Ritz-Carlton.

9 : 5 7 AM 25 But, you know, we have -- for those of you who

9 : 5 7 A M 1 have done one of these carriage tours, there's also a City Jail
9 : 5 7 A M 2 that is -- that I think was constructed in the early 19th
9 : 5 7 A M 3 Century and existed -- I think it was used I think sometime
9 : 5 7 A M 4 into the 20th century, and it is -- if it's not a dungeon, I
9 : 5 7 A M 5 don't know what it is. For those of you who have a moment, you
9 : 5 7 A M 6 might want to go on the Ghost Tour of the City Jail. I hear
9 : 5 7 A M 7 many people leave completely frightened by it.

9 : 5 7 A M 8 But -- so, you know, whose turn is it next month
9 : 5 7 A M 9 for the venue of the cocktail party?

9 : 5 7 A M 10 **MR. PETROSINELLI:** Mr. Thompson.

9 : 5 7 A M 11 **THE COURT:** Oh, my goodness. Mr. Thompson, you're
9 : 5 7 A M 12 getting a tall order here after you -- are you going to have a
9 : 5 7 A M 13 dungeon at yours, you know?

9 : 5 7 A M 14 **MR. THOMPSON:** Well, Judge, I would take them to
9 : 5 7 A M 15 Bowens Island except I'm not sure how we would all get back.

9 : 5 8 A M 16 **THE COURT:** Well, you might rent a bus. That's the
9 : 5 8 A M 17 way -- okay. I look forward to seeing y'all next month.

9 : 5 8 A M 18 This hearing is adjourned.

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2**CERTIFICATE**9 : 5 8 A M
39 : 5 8 A M
49 : 5 8 A M
59 : 5 8 A M
69 : 5 8 A M
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I, Tana J. Hess, CCR, FCRR, Official Court Reporter for the United States District Court, District of South Carolina, certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of proceedings in the above-entitled matter.

9 : 5 8 A M
89 : 5 8 A M
99 : 5 8 A M
109 : 5 8 A M
119 : 5 8 A M
129 : 5 8 A M
139 : 5 8 A M
149 : 5 8 A M
159 : 5 8 A M
169 : 5 8 A M
179 : 5 8 A M
189 : 5 8 A M
199 : 5 8 A M
209 : 5 8 A M
219 : 5 8 A M
229 : 5 8 A M
239 : 5 8 A M
249 : 5 8 A M
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Tana J. Hess, CRR, FCRR, RMR
Official Court Reporter